Civetta Cousins, J.V. *and* Antonio Altomare. Case 2–CA–29518

February 11, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

Upon a charge filed by Antonio Altomare on June 28, 1996, the General Counsel of the National Labor Relations Board issued a complaint on June 12, 1998, against Civetta Cousins, J.V., the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On November 13, 1998, the General Counsel filed a Motion for Summary Judgment with the Board. On November 18, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated October 16, 1998, notified the Respondent that unless an answer were received by October 26, 1998, a Motion for Summary Judgment would be filed with the Board.

The Respondent did not file either an answer to the complaint or a request for an extension of time to do so, before the October 26, 1998 deadline given in the reminder letter dated October 16, 1998. In response to the Notice to Show Cause, however, the Respondent's attorney filed a "Response to Petition for Summary Judgment" with an answer to the complaint attached. The response states that the Respondent retained the attorney on November 17, 1998, at which time the attorney immediately contacted the Regional Office. The Response to Petition for Summary Judgment contains no other explanation why the Respondent failed to answer the complaint despite the appropriate notice and warning that, if no answer was forthcoming by October 26, a motion for summary judgment would be filed. Similarly, the letter does not explain why the Respondent did not request an extension of time to file an answer.

We assume that the Respondent did not have legal representation until November 17, 1998. In determining whether to grant a Motion for Summary Judgment on the basis of a respondent's failure to file a sufficient or timely answer, the Board has, as a general matter, shown leniency to respondents proceeding without the benefit of counsel. Thus, the Board will generally not preclude a determination on the merits of a complaint if it finds that a pro se respondent has filed a timely answer which can reasonably be construed as denying the substance of the complaint allegations.[1] In the instant case, however, the Respondent did not respond to the complaint's allegations or contact the Regional Office, until after the Motion for Summary Judgment was filed on November 13, 1998, despite the October 16, 1998 reminder letter. Further, it has provided no explanation for its failure to do so. In these circumstances, we find that the Respondent's answer to the complaint attached to its response to the Notice to Show Cause is untimely. See *Kenco Electric & Signs*, 325 NLRB No. 210 (July 17, 1998); *Middle Eastern Bakery*, 243 NLRB 503, 504 fn. 1 (1979).

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in the Bronx, New York, has been engaged in the performance of construction work. Annually, the Respondent, in conducting its business operations described above, purchases and receives at its Bronx, New York facility, goods and products valued at more than $50,000 directly from suppliers located outside the State of New York. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Mason Tenders District Council of Greater New York (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the Associated Brick Mason Contractors of New York (the Association) has been an organization composed of various employers engaged in the construction industry, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

[1] See, e.g., *Harborview Electric Construction Co.*, 315 NLRB 301 (1994), and cases cited therein.

At all material times, the Respondent has been an employer-member of the Association, and has authorized the Association to represent it in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

In about July 1994, the Respondent entered into a contract to perform construction work for the New York City School Construction Authority (SCA) at a jobsite at P.S. 20, located at 3050 Webster Avenue, Bronx, New York.

At all material times, the Association and the Union were parties to a collective-bargaining agreement, effective by its terms from September 1, 1993 through May 31, 1996, covering certain employees of the Respondent employed at the P.S. 20 jobsite.

About May 20, 1996, Charging Party Antonio Altomare lodged a complaint with the Union that non-Union employees were doing certain work that was subject to the collective-bargaining agreement. About May 21, 1996, SCA, through its agent Heine Arafat, restricted Altomare's access to the jobsite. This action was known to, and ratified by, the Respondent. About June 21, 1996, the Respondent, through its job superintendent and agent Stuart Wynnerman, suspended Altomare for a day. About June 22, 1996, SCA, through Arafat, evicted Altomare from the jobsite and threatened him with arrest should he return. This action was known to, and ratified by, the Respondent.

About June 24, 1996, the Respondent discharged Altomare. Since that date, the Respondent has failed and refused to reinstate, or to offer to reinstate, Altomare to his former or a substantially equivalent position.

The Respondent engaged in all of the conduct described above because Altomare assisted the Union and engaged in concerted activities, and to discourage employees from engaging in those activities.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has discriminated in regard to hire or tenure or terms and conditions of employment, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1), and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by suspending and discharging Antonio Altomare, we shall order the Respondent to offer him full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. We also shall order the Respondent to make Altomare whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent also shall be required to remove from its files any reference to Altomare's unlawful suspension and discharge, and to notify him in writing that this has been done.

ORDER

The National Labor Relations Board orders that the Respondent, Civetta Cousins, J.V., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees, suspending employees, restricting employees' access to worksites or evicting employees from worksites, or otherwise discriminating against its employees because they assist the Union and engage in concerted activities, and to discourage employees from engaging in those activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Antonio Altomare full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Antonio Altomare whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension and discharge, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Antonio Altomare, and within 3 days thereafter, notify him in writing that this has been done and that his suspension and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in the Bronx, New York, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 21, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 11, 1999

John C. Truesdale, Chairman

Peter J. Hurtgen, Member

J. Robert Brame III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge you, suspend you, or restrict your access to or evict you from worksites, or otherwise discriminate against you because you assist the Mason Tenders District Council of Greater New York and engage in concerted activities, and to discourage you from engaging in those activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Antonio Altomare full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Antonio Altomare whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension and discharge, with interest.

WE WILL remove from our files any reference to the unlawful suspension and discharge of Antonio Altomare and notify him in writing that this has been done and that his suspension and discharge will not be used against him in any way.

CIVETTA COUSINS, J.V.